

83-937
No.

Office - Supreme Court, U.S.

FILED

DEC 5 1983

TEXAS.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

MATIAS MONTEMAYOR DE LA PAZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

MICHAEL J. GUINAN *

39 South LaSalle Street
Suite 1100

Chicago, Illinois 60603
(312) 236-2803

Attorney for Petitioner

GEORGE E. BECKER

39 South LaSalle Street
Suite 1100

Chicago, Illinois 60603
(312) 236-2804

Of Counsel

* Counsel of Record

QUESTIONS PRESENTED

Whether the Petitioner's convictions are contrary to fundamental fairness and due process of law because the pervasive prejudice of the trial judge created a courtroom atmosphere where the rules of evidence did not apply, insufficient evidence was used as the basis to support the convictions and a mandate was placed in the minds of the jury requiring them to convict Petitioner?

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	5
STATEMENT OF FACTS	7
REASONS FOR GRANTING THE WRIT:	

I.

IN LIGHT OF THE INSUFFICIENCY OF THE EVIDENCE PRESENTED TO PROVE THE ALLEGATIONS IN THE VARIOUS COUNTS OF THE INDICTMENT THE PERVASIVE PREJUDICE OF THE TRIAL JUDGE VIOLATED PETITIONER'S RIGHT TO FUNDAMENTAL FAIRNESS AND DUE PROCESS OF LAW	10
A. The Trial Court's Questioning Of Key Prosecution Witnesses Highly Prejudiced The Petitioner And Was A Clear Mis-carriage Of Justice	11
B. The Trial Judge's Charge To The Jury Was A Mandate To Convict Petitioner .	16
C. The Trial Court Erred When It Failed To Instruct The Jury On Lesser Included Of-fenses Under The Continuing Criminal Enterprise Statute	20

D. The Trial Court Erred When It Instructed The Jury That The Violations Requisite To A Continuing Criminal Enterprise Conviction Could Be Predicated Solely On The " <i>Pinkerton</i> " Vicarious Liability Theory	24
---	----

II.

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE PETITIONER'S CONVICTION AND THE JUDGMENT WAS CONTRARY TO FUNDAMENTAL FAIRNESS AND DUE PROCESS	25
--	----

CONCLUSION	28
------------------	----

APPENDIX

1—Opinion of the United States Court of Appeals for the Fifth Circuit	1a
2—Order of the United States Court of Appeals for the Fifth Circuit Denying Rehearing En Banc .	14a
3—Government's Answer to Defendant's Motion for Bill of Particulars as to Count 2	16a
4—Court's Questioning of Jurors Regarding Exhibits	18a

LIST OF AUTHORITIES

Cases

	Page
Beiger v. United States, 295 U.S. 78, 55 S.Ct. 629 (1935)	24
Blumberg v. United States, 222 F.2d 496, 501 (5th Cir. 1955)	10
Brocks v. United States, 240 F.2d 905 (5th Cir. 1957)	19
Bursten v. United States, 395 F.2d 976 (5th Cir. 1968)	11, 19
Curl v. International Business Machines Corp., 517 F.2d 212 (5th Cir. 1975) cert. denied, 425 U.S. 943 (1976)	16
Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942)	26
Gomila v. United States, 146 F.2d 372 (5th Cir. 1944)	11
Herman v. United States, 289 F.2d 362 (5th Cir. 1961)	10
Herron v. Southern Pacific Co., 283 U.S. 91, 51 S.Ct. 383, 75 L.Ed. 857 (1931)	10
Hunter v. United States, 62 F.2d 217 (5th Cir. 1932)	10
Jeffers v. United States, 432 U.S. 137, 97 S.Ct. 2207 (1977)	20, 21, 22
Keeble v. United States, 412 U.S. 205 (1973) ..	21
Mims v. United States, 375 F.2d 135 (5th Cir. 1967)	11, 12
Montford v. United States, 271 F.2d 52 (5th Cir. 1959)	11
Moore v. United States, 598 F.2d 439 (5th Cir. 1979)	11

North Carolina v. Pierce, 395 U.S. 711, 89 S.Ct. 2072 (1969)	22
Pinkerton v. United States, 328 U.S. 640, 66 S.Ct. 1180 (1946)	24
Roe v. United States, 287 F.2d 435 (5th Cir. 1961)	11
Sansone v. United States, 380 U.S. 343 (1965)	21
Starr v. United States, 153 U.S. 614, 14 S.Ct. 919, 38 L.Ed. 841 (1894)	11
United States v. Allied Paving Co., 451 F. Supp. 804 (N.D. Ill. 1978)	23
United States v. Chagra, 669 F.2d 241 (5th Cir. 1982)	21
United States v. Diaz, 585 F.2d 116 (5th Cir. 1978)	14
United States v. Daniels, 572 F.2d 535 (5th Cir. 1978)	12
United States v. Grinnell Corp., 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966)	16
United States v. Haskins, 345 F.2d 111 (6th Cir. 1965)	23
United States v. Hill, 332 F.2d 105 (7th Cir. 1964)	20
United States v. Jacquillion, 496 F.2d 380 (5th Cir. 1972)	10
United States v. Jimenez, 613 F.2d 1373 (5th Cir. 1980)	14
United States v. Lanham, 416 F.2d 1140 (5th Cir. 1969)	15
United States v. Leonelli, 428 F. Supp. 880 (S.D. N.Y. 1977)	23
United States v. Lurz, 666 F.2d 69 (4th Cir. 1981)	20
United States v. Michel, 588 F.2d 968 (5th Cir. 1979)	24
United States v. Musgrave, 444 F.2d 755 (5th Cir. 1971)	17
United States v. Posten, 436 F.2d 706 (6th Cir. 1970)	14

United States v. Ragsdale, 438 F.2d 21 (5th Cir. 1971)	11
United States v. Sheldon, 544 F.2d 213 (5th Cir. 1976)	15
United States v. Sperling, 506 F.2d 1323 (2nd Cir. 1974)	22
United States v. Welliver, 601 F.2d 203 (5th Cir. 1979)	12
United States v. Valenzuela, 596 F.2d 1361 (9th Cir. 1979)	20
United States v. Womack, 454 F.2d 1337 (5th Cir. 1972)	17
Whitehurst v. Wright, 592 F.2d 834 (5th Cir. 1979)	16
Yates v. United States, 354 U.S. 298, 77 S.Ct. 1064 (1957)	22

Constitutional Provisions And Statutes

U.S. Const. Amend. V	25
21 U.S.C. Sec. 841	2, 5
21 U.S.C. Sec. 846	2, 5, 21
21 U.S.C. Sec. 848	3, 5, 20, 21, 23
21 U.S.C. Sec. 959	4, 5, 6
21 U.S.C. Sec. 963	4, 5
28 U.S.C.A. Sec. 455(a)(b)(1)	16
Fed. R. Crim. P. 31	21
Fed. R. Of Evid. 614	10

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

MATIAS MONTEMAYOR DE LA PAZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

Matias Montemayor De La Paz hereby petitions that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on August 5, 1983 and the subsequent denial of the Petition for Rehearing En Banc entered on October 6, 1983.

OPINION BELOW

The judgment and opinion of the United States Court of Appeals for the Fifth Circuit was entered on August 5, 1983 (No. 82-2249). The opinion is contained in the Appendix at Page 1a. A petition for rehearing en banc made on behalf of the Petitioner was denied on October 6, 1983. (Appendix 2).

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on October 6, 1983 (No. 82-2249) affirming the Petitioner's conviction and sentence entered by the United States District Court for the Southern District of Texas, Brownsville Division on May 14, 1982. The jurisdiction of this court is invoked under and pursuant to Title 28 United States Code, Section 1254(1).

STATUTES INVOLVED

Section 841 of Title 21 United States Code provides:

"(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense a controlled substance;

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance."

Section 846 of Title 21 United States Code provides:

"Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

Section 848 of Title 21 United States Code provides:

"(a)(1) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than \$100,000, and to the forfeiture prescribed in paragraph (2); except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine of not more than \$200,000, and to the forfeiture prescribed in paragraph (2).

(2) Any person who is convicted under paragraph (1) of engaging in a continuing criminal enterprise shall forfeit to the United States—

(A) the profits obtained by him in such enterprise; and

(B) any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise.

Continuing Criminal Enterprise Defined

(b) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if—

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies

a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources."

Section 959 of Title 21 United States Code provides:

"It shall be unlawful for any person to manufacture or distribute a controlled substance in schedule I or II

(1) intending that such substance will be unlawfully imported into the United States; or

(2) knowing that such substance will be unlawfully imported into the United States.

This section is intended to reach acts of manufacture or distribution committed outside the territorial jurisdiction of the United States. Any person who violates this section shall be tried in the United States District Court at the point of entry where such person enters the United States, or in the United States District Court for the District of Columbia."

Section 963 of Title 21 United States Code provides:

"Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

STATEMENT OF THE CASE

Matias Montemayor De La Paz, hereinafter referred to as Petitioner was one of eight Defendants, five of whom were brothers, named in a 16-count indictment presented in the Southern District of Texas on November 17, 1981.

Count 2 of the indictment charged the Petitioner with having engaged in a continuing criminal enterprise in violation of 21 U.S.C. Sec. 848(b).

Counts 3 and 5 charged that Petitioner and other co-defendants had conspired to unlawfully distribute cocaine and marijuana respectively in violation of 21 U.S.C. Secs. 846 and 841(a)(1).

Counts 4 and 9 likewise charged that the Petitioner had conspired to violate federal drug laws, but 4 alleged the unlawful manufacture and distribution of heroin in violation of Secs. 846 and 841(a)(1) as the object offense, while 9 made similar accusations with the additional element that the Petitioner knew of importation into the United States in violation of 21 U.S.C. Secs. 963 and 959.

Counts 6, 7 and 8 alleged the substantive offense of unlawful distribution of cocaine in violation of Sec. 841(a)(1) and 18 U.S.C. Sec. 2. Counts 6 and 7 were dismissed after motion judgment of acquittal.

Count 10 alleged the unlawful distribution of "approximately 45 packages of Schedule I or II narcotics," knowing that the same would be imported into the United States in violation of 21 U.S.C. Sec. 959 and 18 U.S.C. Sec. 2.

Lastly, Count 12 alleged the distribution of "a multi-kilogram quantity of cocaine," knowing that the same would be imported into the United States in violation of 21 U.S.C. Sec. 959 and 18 U.S.C. Sec. 2.

A verdict of guilty was returned on each of the counts, including Count 2 (continuing criminal enterprise). The trial court bifurcated the proceedings under Count 2, and following the verdict of guilty thereon, the jury returned a supplemental verdict calling for a forfeiture of certain real and personal property. (Transcript Vol. 1, p. 1229).

The jury having convicted the Petitioner as aforementioned, the trial judge sentenced him as follows:

1. Count 2 (continuing criminal enterprise)—fifty-five (55) years without parole and a fine of \$100,000, as well as the forfeiture of property in accordance with the supplemental verdict.

2. Count 3 (conspiracy to distribute cocaine)—fifteen (15) years and a \$25,000 fine, to run concurrent with Count 2.

3. Count 4 (conspiracy to manufacture and distribute heroin)—fifteen (15) years and a \$25,000 fine, to run concurrent with Count 2.

4. Count 9 (conspiracy to manufacture and distribute heroin with knowledge of import)—fifteen (15) years and a \$25,000 fine, to run concurrent with Count 2.

5. Count 8 (distribution of cocaine)—fifteen (15) years and a \$25,000 fine; special parole term of three years; to run consecutive to Counts 3, 4 and 9, but concurrent with Count 2.

6. Count 5 (conspiracy to distribute marijuana)—five (5) years and a \$15,000 fine, to run concurrent with Count 2.

7. Count 10 (distribution of Schedule I or II narcotics)—five (5) years; special parole term of two years, to run consecutive with Counts 3, 4, 5, 9 and 8, but concurrent with Count 2.

8. Count 12 (distribution of cocaine)—fifteen (15) years and a \$25,000 fine; special parole term three years, to run concurrent with Count 2. (Sentencing, Vol. 4, pp. 15-18).

On August 5, 1983, the United States Court of Appeals for the Fifth Circuit affirmed the Petitioner's convictions. (Appendix 1). A subsequent motion for rehearing en banc was denied by the Fifth Circuit on October 6, 1983.

STATEMENT OF FACTS

The government's entire case rested upon the testimony of one witness, Ricky Lee Bowman, a stepson of co-defendant, Benito Montemayor. Bowman's testimony was sheer fantasy, and the government used his unfounded and unsupported conclusions and statements as the basis for conviction and an appalling 55 year, no parole, sentence. The Petitioner, who has received a sentence tantamount to death, merely prays that the record be reviewed with the fundamental principles of fair trial and due process of law at mind.

Regrettably and with great reluctance, the Petitioner alleges that the Fifth Circuit Court of Appeals went on a fishing trip to snare facts to support conviction, and in so doing, totally abandoned the reasonable man and permissible inference theories of law. The Court overstated

and misstated the facts, misconstrued the evidence so as to bridge gapping holes in the government's proof, and held the Petitioner accountable for acts of others under the Pinkerton theory (*infra*) when there was a total failure by the government to show Petitioner's entry into a conspiracy. Limitation of pages prohibits the Petitioner from stating the facts presented at trial to support convictions on all counts. A review of the Fifth Circuit Court of Appeals' opinion, pages 3a-8a, amplifies the claim that the reasonable man and permissible inference theories were foresaken.

Addressing the continuing enterprise conviction, the Court found the following stated testimony of government witness Bowman sufficient to support conviction on Count 8, one of three predicate offenses necessary for conviction. (See Argument II). Bowman testified: "They had the clothes basket sitting on the tailgate there." (Tr. 246). Bowman further testified that he saw "packages" in the laundry basket (Tr. 248) and that "(e)verybody was there." (Tr. 246). From this testimony the Court concluded that the jury had a right to infer that the packages contained cocaine, that the tailgate would not have been dismantled unless contraband was to be secreted therein, and more astoundingly, that from the term "everyone" the jury could infer that the Petitioner was present. And concerning the second predicate offense (Count 10), the Court found the following testimony sufficient to support conviction. Bowman testified that on one occasion while at the home of Benito Montemayor in Cerralvo, Mexico in October 1977, Benito brought in 40-45 packages of heroin and declared that they needed to be repackaged. Bowman testified that Petitioner was present at the repackaging. The Court stated the jury could reasonably infer that Petitioner was more than an innocent bystander, that the

substance being packaged was heroin or any other controlled substance, and without any further evidence being offered, that the alleged contraband was to be brought from Mexico into the United States for distribution.

The evidence to support the third predicate offense (Count 10) necessary for conviction on Count 2 was equally insufficient, and the Court realizing so stated on page 9 of its opinion that Petitioner's culpability on Counts 8, 9, 10 could be premised on the *Pinkerton* theory. (Argument 1D). This vicarious liability theory is totally contrary to the government's burden to prove Petitioner's managerial role.

The Petitioner realizes that appeals based upon insufficiency of the evidence are given little consideration by Courts of review, and does not quarrel with that prevailing view.

However, in the instant case where the abysmal insufficiency of the evidence was coupled with the pervasive prejudice of the trial court so as to deny the Petitioner a fair trial and due process of law, then everything our system of jurisprudence stands for mandates careful consideration and review—especially in light of the imposition of a virtual death sentence.

REASONS FOR GRANTING THE WRIT

I.

IN LIGHT OF THE INSUFFICIENCY OF THE EVIDENCE PRESENTED TO PROVE THE ALLEGATIONS IN THE VARIOUS COUNTS OF THE INDICTMENT, THE PERVASIVE PREJUDICE OF THE TRIAL JUDGE VIOLATED PETITIONER'S RIGHT TO FUNDAMENTAL FAIRNESS AND DUE PROCESS OF LAW.

It is axiomatic, as stated in *Herman v. United States*, 289 F.2d 362, 365 (5th Cir. 1961), cert. denied, 368 U.S. 897, 82 S.Ct. 174, 7 L.Ed.2d 93, that; "(t)he trial judge has a duty to conduct the trial carefully, patiently, and impartially. He must be above even the appearance of being partial to the prosecution." See also: *Blumberg v. United States*, 222 F.2d 496, 501 (5th Cir. 1955); *Hunter v. United States*, 62 F.2d 217, 220 (5th Cir. 1932). On the other hand, a federal judge is not a mere moderator of proceedings. See *Herron v. Southern Pacific Co.*, 283 U.S. 91, 95, 51 S.Ct. 383, 384, 75 L.Ed. 857 (1931). He is a common law judge having that authority historically exercised by judges in the common law process. Rule 614(b) of the Federal Rules of Evidence allows the trial judge to interrogate a witness. This authority is abused when the judge abandons his proper role and assumes that of advocate. Federal Rule of Evidence—Rule 614 Subdivision (b). When the judge's conduct strays from neutrality the defendant thereby is denied a constitutionally fair trial. *United States v. Jacquillon*, 496 F.2d 380, 387 (5th Cir. 1972), cert. denied, 410 U.S. 938, 93 S.Ct. 1400, 35 L.Ed.2d 604 (1973).

No fact, not even an undisputed fact, may be determined by the trial judge. A plea of not guilty puts all

in issue, even the most patent truths. In our federal system, the trial court may never instruct a verdict either in whole or in part. *Roe v. United States*, 287 F.2d 435 (5th Cir. 1961). No matter how conclusive the evidence any such instruction amounts to plain error. *United States v. Ragsdale*, 438 F.2d 21 (5th Cir. 1971); *Mims v. United States*, 375 F.2d 135, 148 (5th Cir. 1967); *Montford v. United States*, 271 F.2d 52 (5th Cir. 1959).

The trial judge must strive for total neutrality and complete circumspection in the eyes and minds of the jury. *Starr v. United States*, 153 U.S. 614, 626-628, 14 S.Ct. 919, 38 L.Ed. 841 (1894); *Moore v. United States*, 598 F.2d 439 (5th Cir. 1979). The reason that a trial judge must remain neutral is because it is well known, as a matter of judicial notice, that juries are highly sensitive to every utterance by the trial judge and that some comments may be so highly prejudicial that even a strong admonition by the judge to the jury, that they are not bound by the judge's view, will not cure the error. *Bursten v. United States*, 395 F.2d 976 (5th Cir. 1968).

A. The Trial Court's Questioning Of Key Prosecution Witnesses Highly Prejudiced The Petitioner And Was A Clear Miscarriage Of Justice.

When a judge questions a witness he must be careful to preserve an attitude of impartiality and guard against giving the jury any impression that the court is of the opinion that the defendant is guilty. *Gomila v. United States*, 146 F.2d 372, 374 (5th Cir. 1944).

When a judge interjects himself into a trial by questioning witnesses, the judge places the opposing counsel in a disadvantageous position. The attorney may hesitate to object to the judge's examination for fear of creating a conflict, or appearing to create a conflict, between the

judge and himself. Therefore, when the attorneys are competently conducting their cases it is improper for the trial judge to ask questions. *United States v. Daniels*, 572 F.2d 535 (5th Cir. 1978); *United States v. Welliver*, 601 F.2d 203 (5th Cir. 1979). Questioning by the trial judge can reach such a prejudicial level that the "plain error" doctrine is invoked. The "plain error" rule is invoked where judicial error affects substantial rights of a defendant and an appellate court is required to remedy a clear miscarriage of justice. *Mims v. United States*, 375 F.2d 135, 147 (5th Cir. 1967).

In the instant case during the cross-examination of Carlos Gutierrez, the trial judge pre-empted the questioning of the prosecution's witness. The transcript of the proceedings reads as follows (Tr. 66-69):

THE COURT: But over what times would Mr. Montemayor make the deliveries to you? Was it once a month or once every two months, or how were those deliveries spaced?

THE WITNESS: Reyes Montemayor would go to Mexico—

MR. SZEKELY: Your Honor, I object. That's not responsive to the question asked. I was trying to establish a time frame.

THE COURT: *I will overrule your objection. This is the way he is doing it, I suppose.*

THE WITNESS: Reyes Montemayor would go to Mexico once a week or once every two weeks to account to Matias Montemayor, and that is why Reyes Montemayor would tell me, "Brother, wait a while"—

THE COURT: Cousin.

THE WITNESS: *"Cousin, wait a while for me to go talk to Matias at the prison, but Matias was about to leave or had already left"*—

THE COURT: *No, about to be released.*

Just a minute. Let's have a little recess. I will tell you what. Let's break for lunch. Let's take a lunch recess. Let's be back at—jurors, let's be back at 1:30. I will give you an hour and a half to eat. You go with the Marshall. All please rise.

(Jury Not Present.)

THE COURT: Madam Interpreter, I think what your problem is that you are letting this witness say too much and speak too long before you interpret what he says, and you lose track of what he is saying. You are making some errors, and I am having to correct you, and I don't want to do that.

Now, if the witness is saying too much, more than you can remember, you tell him to stop a minute. He doesn't know. Then you can go ahead and translate what he is saying, and then he can continue with his answer.

THE INTERPRETER: Yes, Judge.

THE COURT: I think you are getting everybody confused instead of enlightening everyone.

Mr. Szekely, I interrupted you. What were you going to say?

MR. SZEKELY: I think the witness testified in the presence of the jury that the defendant Matias Montemayor was in prison—

THE COURT: That's the way I understood it.

MR. SZEKELY: —during this particular time, indicating that he was subject to some conviction and some penal process.

I would submit that it's prejudicial at this point to the defendant. It reflects a conviction on his part there was no way in the world the government could introduce.

I submit there is nothing at this point to do but declare a mistrial.

THE COURT: I will instruct the jury on that, and let's see what happens. You are going into these mat-

ters, counsel, and this witness' memory is not the best in the world. You were just taking chances when you asked these questions."¹ (Tr. 67-68).

It is well established that trial judges should carefully limit the use of "other crimes" evidence whenever the possibility of prejudice exists. *United States v. Jimenez*, 613 F.2d 1373, 1377 (5th Cir. 1980). The Fifth Circuit previously held that the imperativeness of distinguishing "credibility evidence and affirmative evidence" for the jury, imposed a duty on the court, as well as both counsel, to see that the other crimes evidence would not be taken by the jury as an inference of guilt. *United States v. Diaz*, 585 F.2d 116 (5th Cir. 1978).

The Sixth Circuit followed similar reasoning in vacating a guilty verdict against a defendant in *United States v. Posten*, 436 F.2d 706 (6th Cir. 1970). The court held that the failure of the trial judge to give a cautionary instruction was plain error in light of the inherent prejudice of a reference by a co-conspirator that defendant had twice before been sentenced to prison.

The trial judge's questioning of witness Gutierrez was the first in a parade of prejudicial questions and comments by the court which became a mandate for the jury to return a guilty verdict against the Petitioner.

When the government introduced two tape recorded telephone conversations between drug agent, Frank Tucci, and an alleged co-conspirator, the court refused to allow Petitioner's counsel to question the witness about voice print identification. (Tr. 112-113). Moments later the judge

¹ The Court failed to give a cautionary instruction to the jury regarding the prison testimony.

allowed the government attorney to question the witness regarding voice print identification. (Tr. 114). The court had sustained a defense objection to the line of questioning, but then allowed the witness to respond to the questions about the voice print identification. (Tr. 115).

During the testimony of government witness Ricky Bowman, the trial judge permitted the government's attorney to explain to the jury what certain exhibits depicted prior to their introduction into evidence. The court went on to make the prejudicial statement (Tr. 187):

"Well I assume they are eventually going to be in evidence."

The court then refused to allow Petitioner's attorney to conduct a voir dire examination regarding several exhibits that Bowman could not identify. The judge indicated that Petitioner's counsel would be allowed to question Bowman about the exhibits during cross-examination. However, before Petitioner could conduct cross-examination, the trial judge allowed the jurors to see all of the contested exhibits. (Tr. 197-198).

At the close of both his direct and cross-examination, Bowman failed to identify Petitioner in open court. The trial judge then undertook independent examination and elicited the identification of Petitioner. Identification of a defendant is a critical issue in any criminal case and therefore the judge became an advocate for the prosecution. *United States v. Sheldon*, 544 F.2d 213 (5th Cir. 1976); *United States v. Lanham*, 416 F.2d 1140 (5th Cir. 1969).

The court also questioned government witness, Robert Shirley, regarding the purchase of an airplane. Shirley testified that he did not recall who was listed as purchaser of his airplane (Tr. 461), but during the court's question-

ing stated Petitioner had purchased the plane. (Tr. 464). The questioning was critical because the Petitioner was charged with conducting a continuing criminal enterprise and the government must prove a defendant amassed wealth in order to obtain a conviction under the statute. The Petitioner was later required to introduce evidence that the airplane was purchased by a corporation. The trial judge in his charge to the jury viewed the corporation testimony with skepticism. (Tr. 893).

The trial judge made numerous other errors including allowing hearsay business records into evidence (Tr. 301, 337-338), identifying a co-defendant of the Petitioner for a witness (Tr. 303) and allowing testimony from, and the introduction into evidence, of a hearsay Drug Enforcement Administration report. (Tr. 575).

B. The Trial Judge's Charge To The Jury Was A Mandate To Convict The Petitioner.

A general rule of law exists that bias to disqualify a judge must come from extrajudicial sources. *United States v. Grinnell Corp.*, 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966). However, an exception exists where "such pervasive bias and prejudice is shown by otherwise judicial conduct as would constitute bias against a party." *Curl v. International Business Machines, Corp.*, 517 F.2d 212 (5th Cir. 1975), cert. denied, 425 U.S. 943 (1976); 28 U.S.C.A. Sec. 455(a)(b)(1). Thus the single fact that a judge's comments are made in a judicial context will not prevent a finding of bias on the judge's part. *Whitehurst v. Wright*, 592 F.2d 834 (5th Cir. 1979).

Petitioner concedes that he never presented a motion to disqualify the trial judge in the case at bar. However, he urges that the prejudicial comments by the judge

in his charge to the jury not only show pervasive bias against him, they violate fundamental fairness and due process of law. While it is well settled that a federal judge is not relegated to complete silence during a criminal trial, he must be careful that his interventions are proper and timely made, to clear unanswered issues which are not prejudicial to the defendant. Many federal decisions recognize the power of a judge, within reasonable limits, to comment on the evidence and express fair opinions. *United States v. Womack*, 454 F.2d 1337 (5th Cir. 1972); *United States v. Musgrave*, 444 F.2d 755 (5th Cir. 1971).

In this case the trial judge first lectured the jury on the advantages of having paid informants work for the government.² The court stated (Tr. 879):

"There were some comments, for example, in the arguments, some criticism about the fact that the government pays informants or pays expenses or buys drugs. There is nothing illegal about that. As a matter of fact, the Congress has appropriated funds for that purpose, as a means of taking drugs off the market, keeping them from the hands of addicts and of apprehending those that would violate our laws pertaining to narcotics and drugs. And there is nothing wrong with that.

The alternatives to that are something far more expensive to the taxpayers, in the form of addiction and the crimes an addict may commit."

The court went on to state (Tr. 891-893):

"But the government proved up testimony of violations. I believe the witness Bowman testified he

² Ricky Bowman was a paid informant and the star witness in the government's case in chief. The only testimony that the government presented to allegedly prove the petitioner was involved in any drug scheme was adduced through Bowman.

was a member of this group, that he packaged marijuana over a period of time, counted money over a long period—over a period of time; that Salvador Flores, another member of the group, made numerous trips in this vehicle that had been rigged to carry contraband—I believe he said it was marijuana. It could be anything, any controlled substance—and distributed it, for the purpose of distributing marijuana.

The witness Gutierrez testified that he himself had made, I think, nine or eleven purchases of one-pound packets of heroin. The amount of heroin is irrelevant. Whether it was a pound or an ounce doesn't make any difference, so long as there was some heroin.

Each of those transactions, if you believe they occurred, would be a transaction, would be an offense of the law. Each time that Flores brought any type of controlled substance in that truck, that would be a violation of the law, you see, and each one would be a separate offense.

The government produced evidence that Mr. Montemayor spent substantial sums of money, cash expenditures, that he is the man who wound up with the cash that supposedly was the gain from this enterprise, in addition to testimony from the witness that he was in some position of authority. So that's the testimony that the government presented."

The trial judge took each element of the continuing criminal enterprise statute and told the jury that sufficient evidence existed to convict the Petitioner. The court first referred to the fact that the government proved violations occurred. The trial judge then told the jury that a group existed regarding the importation of illegal narcotics. The judge went on to state that numerous illegal narcotics transactions had occurred all of which were separate offenses. The judge stated that the Petitioner had spent substantial sums of money which he gained

from the enterprise and that the Petitioner was in a position of authority within the enterprise.

The court's comment on the income of the Petitioner became even more prejudicial when the judge stated (Tr. 893):

"Mr. Montemayor was a part-owner of this corporation in Mexico, and that in 1980 it made all of these monies and from that, *I assume*, asks you to conclude as a circumstance that the corporation made money in other years, although there was no evidence of any kind as the earnings of the corporation in 1979 and 1978 and earlier years."

The court in essence placed a burden of proof upon the Petitioner to prove his income was not derived from the sale of illegal narcotics which is totally contrary to our justice system.

Later the trial court singled out the head nodding incident at the El Trumpo Bar in Chicago:

"If you believe that he was there present and nodded and knowing what was going on and to give his assent to what was being said, that would be evidence, *obviously*, he was involved in the transaction." (Tr. Vol. 5, p. 899).

Whether any of the alleged acts occurred and whether any of the collateral events happened were fact issues for the jury to decide. The trial judge's comments directed a verdict on these fact issues. *Brocks v. United States*, 240 F.2d 905 (5th Cir. 1957). The trial judge expressed the opinion that the Petitioner was guilty and his comments were so highly prejudicial that even the strongest admonition to the jury that they were the sole triers of fact would not suffice to grant defendant a fair trial. *Bursten v. United States*, 395 F.2d 976, 983 (5th Cir. 1968). The comments destroyed the cloak of impartiality which the

trial judge should wear. *United States v. Hill*, 332 F.2d 105, 106 (7th Cir. 1964).

The court also discovered that two laboratory reports of a chemist were mistakenly sent to the jury.³ The court admonished the jury to disregard the exhibits and later promised to question the jury regarding the exhibits following their verdict. (Tr. 936). The inquiry revealed several jurors had seen the exhibits. (App. p. 18a).

C. The Trial Court Erred When It Failed To Instruct The Jury On Lesser Included Offenses Under The Continuing Criminal Enterprise Statute.

Five elements make up the offense of continuing criminal enterprise under Title 21 U.S.C. Sec. 848:

1. A violation of federal narcotic laws;
2. which is part of a continuing series of violations (three or more; *United States v. Valenzuela*, 596 F.2d 1361 (9th Cir. 1979));
3. in concert with five or more persons;
4. for whom the defendant is an organizer or supervisor;
5. from which he derives substantial income or resources. *United States v. Lurz*, 666 F.2d 69 (4th Cir. 1981).

The United States Supreme Court has noted the severity of the statute and found that Congress was interested in punishing the professional criminal. *Jeffers v. United States*, 432 U.S. 137, 97 S.Ct. 2207 (1977). The severity of the charge requires that the trial court operate with

³ The chemist reports showed traces of cocaine were found on a pool table and in a Chevrolet Blazer. This was the only direct evidence of narcotics in this case.

the fullest sense of fundamental fairness and due process of law.

A jury must first consider whether a defendant committed three specific underlying acts before it can consider the remaining elements of a continuing criminal enterprise, much less find the defendant guilty of the charge.

Federal Rule of Criminal Procedure 31(c) states that a defendant may be found guilty of an offense necessarily included in the offense charged, or of an attempt to commit either the offense charged or an offense necessarily included therein, if the attempt is an offense.

The lesser included offense doctrine was developed at common law to assist the prosecution in cases where the evidence failed to establish some element of the offense originally charged. It is now beyond dispute that the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater. *Keeble v. United States*, 412 U.S. 205 (1973).

The United States Supreme Court has held that a conspiracy charge brought under Title 21 U.S.C. Sec. 846 is a lesser included offense of Sec. 848. *Jeffers v. United States*, *supra*. The *Jeffers* court also held that if a conspiracy charge and a continuing criminal enterprise charge were tried in one proceeding, a lesser included offense instruction should be given to the jury, citing *Keeble*, *supra*; *Sansone v. United States*, 380 U.S. 343, 349-50 (1965).⁴

⁴ The Fifth Circuit noted that a lesser included offense instruction was given in *United States v. Chagra*, 669 F.2d 241 (5th Cir. 1982) a case involving narcotics conspiracies and a continuing criminal enterprise charge.

Not only did the trial court fail to instruct the jury of the lesser included offense, it also failed to instruct the jury that it must first consider if Petitioner committed three specific underlying substantive violations before considering the remaining elements of a continuing criminal enterprise. *United States v. Sperling*, 506 F.2d 1323 (2nd Cir. 1974); Devitt and Blackmar, Federal Jury Practice and Instructions, 3rd Ed., Sec. 5821.⁵

The failure of the trial judge to instruct the jury as requested leaves open to interpretation which three predicated violations were found by the jury for the continuing criminal enterprise conviction. Because the trial court failed to give the requested instruction there exists the possibility that the jury verdict was based on a charge legally incapable of supporting the conviction. *Yates v. United States*, 354 U.S. 298, 371, 77 S.Ct. 1064, 1073 (1957).

Additionally, because no basis exists to determine what three drug felonies the jury used as the underlying basis for the continuing criminal enterprise conviction it is impossible to determine if the sentence imposed upon the Petitioner violates the double jeopardy clause of the United States Constitution. The double jeopardy clause in part prevents a defendant from being punished more than once for the same crime. *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). The Supreme Court has held that Congress did not intend to punish a defendant for both a continuing criminal enterprise conviction and the underlying offenses used to prove that violation. *Jeffers v. United States*, 432 U.S. 137, 97 S.Ct. 2207, 53 L.Ed.2d 168 (1977).

⁵ The defendant requested that the instruction be given to the jury.

Even the trial court was confused regarding the conspiracy counts and the continuing criminal enterprise conviction. The judge stated:

"So on Counts 3, 4, 5 and 9, I am going to—find that I am going to consolidate those counts one with the other and all of them with Count 2 because I believe they consolidate, as a matter of law, lesser offenses of Count 2, but I don't know—I don't know. Number one, I could be mistaken . . ."

Following this statement the court imposed a sentence of 15 years and a fine of \$25,000 on each count as well as a sentence of 55 years without parole and a \$100,000 fine for the Sec. 848 conviction. (Tr. Sentencing of Petitioner, p. 16).

The prejudice created by the failure to properly instruct the jury is heightened in light of the Bill of Particulars supplied by the government regarding Count 2 of the indictment (App. pp. 16a-17a). The Bill of Particulars listed the substantive offense committed by the Petitioner as occurring during September or October, 1977, at Benito Montemayor's home on 32 A Street, Colonia Las Crumbres, Monterrey N. L. Mexico.

Numerous courts have held that once a Bill of Particulars has been furnished the government's proof is strictly limited to the scope thereof. *United States v. Haskins*, 345 F.2d 111 (6th Cir. 1965); *United States v. Leonelli*, 428 F. Supp. 880 (S.D.N.Y. 1977); *United States v. Allied Paving Co.*, 451 F. Supp. 804 (N.D. Ill. 1978).

Despite Petitioner's reliance on the Bill of Particulars supplied by the government, the trial court instructed the jury that the predicate violations requisite to a continuing criminal enterprise conviction could be any as shown by the evidence including specifically any violations committed by Salvador Flores and Carlos Gutierrez. (Tr. 892).

The open-ended government proof presented at trial coupled with the trial court's jury instructions violated fundamental notions of due process. *Beiger v. United States*, 295 U.S. 78, 55 S.Ct. 629 (1935).

D. The Trial Court Erred When It Instructed The Jury That The Violations Requisite To A Continuing Criminal Enterprise Conviction Could Be Predicated Solely On The "*Pinkerton*" Vicarious Liability Theory.

The court has held that once a person joins in an unlawful scheme of a continuous duration, and that person does nothing to withdraw from the scheme, disavow acts, or defeat the purpose of the scheme, he or she is responsible for acts committed by other parties to the scheme. *Pinkerton v. United States*, 328 U.S. 640, 66 S.Ct. 1180 (1946). The vicarious liability rationale is based upon an agreement or common purpose shared by co-conspirators; they are partners in crime and the act of one in furtherance of an unlawful plan is an act of all. *United States v. Michel*, 588 F.2d 968 (5th Cir. 1979).

The Fifth Circuit has approved the *Pinkerton* theory application in continuing criminal enterprises cases. *Michel*, supra. However, the *Pinkerton* theory is totally opposite the rationale required for a continuing criminal enterprise conviction. Both by statute and case law, a defendant must be a supervisor or organizer in order to be convicted of operating a continuing criminal enterprise. *Michel*, supra; *Chagra*, supra; *Jeffers*, supra. It is difficult if not impossible to comprehend how an individual can supervise or control a group of persons (five or more) yet not know of the acts by those members of the group in furtherance of the conspiracy.

A classic example of the inherent danger and prejudice to a defendant is presented by the court's charge to the

jury in this case. The judge instructed the jury that the Petitioner would be vicariously liable for the acts of all members of the enterprise including marijuana trips of Salvador Flores, when there was absolutely no evidence that Petitioner was a member of any conspiracy during the time Flores supposedly was engaged in his criminal activity. The trial judge further prejudiced Petitioner when he omitted the language of the *Pinkerton*, caveat; that one is not responsible for the unforeseeable acts of co-conspirators. (Tr. Vol. 5, pp. 890-892). In effect the Court's all encompassing charge subjected Petitioner to unlimited criminal responsibility.

II.

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE PETITIONER'S CONVICTIONS AND THE JUDGMENT WAS CONTRARY TO FUNDAMENTAL FAIRNESS AND DUE PROCESS.

The primary issue for this court is whether it will allow convictions obtained without fundamental fairness and due process of law to stand. The Constitution of the United States, Amendment V, provides in pertinent part: No person shall . . . be deprived of life, liberty or property, without due process of law . . . Petitioner urges that he has been totally deprived of due process of law—his right to fundamental fairness totally forsaken. It is becoming painfully clear that a defendant charged with extensive drug violations falls into a separate class of citizen who is not entitled to the Constitutional guarantees of fundamental fairness and due process of law, and all that need to be shown for his conviction is an indictment. Upon appeal, review courts are reluctant to give serious considerations to an argument based on sufficiency of the evidence, for the reviewing court is asked to reverse findings of fact made by a jury or trial court.

Petitioner does not urge this court to consider any controverted evidence, but to take only the evidence presented by the government during its case in chief and view it in a light most favorable to the government. *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942). Using the "reasonable man standard" and permissible inference theory, a review of the evidence would show a total failure to prove each and every count of the indictment, a modern day tragedy in light of the 55 year, no parole, sentence imposed upon the defendant.

The government relied almost exclusively on events allegedly occurring in Mexico to support violations of United States narcotic laws. To support the allegations regarding cocaine, government witness, Ricky Bowman testified he saw a Chevrolet Blazer loaded and unloaded and that he snorted a substance off a pool table cover. Yet, when cross-examined, Bowman stated he did not see the Blazer loaded, did not see what substance was loaded in the Blazer (Tr. 249) and never saw anyone place cocaine on the pool table cover. (Tr. 250-251). Bowman further testified that while in Mexico he spilled some cocaine on a driveway while loading another Blazer and saw 200 packages of cocaine on Huero Macias' dining room table. Bowman's testimony as to the contents of the packages was conclusionary and he did not meet any qualifications to determine that the substance was in fact cocaine.

To support the heroin allegations Bowman testified he saw a laboratory in Mexico and saw heroin packaged on one occasion. A typical example of Bowman's conclusionary statements throughout the trial is revealed by his testimony about the heroin packaging. (Tr. 158). The transcripts reads as follows:

"Question: How do you know that heroin was in the packages?

Answer: I know how Bennies operates . . ."

Bowman went on to testify about smuggling heroin from the United States into Mexico. (Tr. 164). Once again Bowman did not see the substance but stated that Benito Montemayor told him there was heroin in the trailer attached to their car.

The trial court allowed the introduction into evidence of general statements and conclusions to support Petitioner's supervisory status for the continuing criminal enterprise conviction. Bowman was asked on numerous occasions who the leader of the group was? Even though Petitioner was rarely alleged to be near any narcotic substance and never shown to have committed any illegal act, Bowman always replied, Matias Montemayor was in charge.

Throughout the entire case the government failed to introduce any narcotic substance into evidence.⁶ The government presented no evidence or testimony aside from conclusionary statements and guesses as to the contents of packages and the actions of parties. The proverbial reasonable man should not be allowed to consider fragmented bits of evidence which only create a suspicion of inculpa-tion and use such as a basis for conviction. The harsh reality of this case is that Petitioner received 55 years in prison with no chance of parole for narcotics violations without any proof that he committed illegal acts.

⁶ Chemist, Edwin Albers, testified that he vacuumed a Chevrolet Blazer 9 months after it was in government custody and control and that he vacuumed a pool table cover two years after cocaine was allegedly placed on it. Each time Albers claimed to find an unmeasurable trace of cocaine.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should grant the Petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

MICHAEL J. GUINAN *

39 South LaSalle Street
Suite 1100
Chicago, Illinois 60603
(312) 236-2803

Attorney for Petitioner

GEORGE E. BECKER

39 South LaSalle Street
Suite 1100
Chicago, Illinois 60603
(312) 236-2804

Of Counsel

* Counsel of Record

APPENDIX 1

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-2249

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus

MATIAS MONTEMAYOR-DE LA PAZ,
Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Texas

(August 5, 1983)

Before RUBIN and TATE, *Circuit Judges*, and DAVIS*,
District Judge.

DAVIS, *District Judge.* Appellant, Matias Montemayor De La Paz, was one of eight defendants named in a 16-count indictment charging violations of numerous federal drug laws. After a six-day jury trial in the Southern District of Texas, Montemayor was found guilty

* District Judge of the Western District of Louisiana, sitting by designation.

of engaging in a continuing criminal enterprise, in violation of 21 U.S.C. § 848 (Count II); conspiring to commit violations of 21 U.S.C. §§ 841(a)(1) and 959 (Counts III, IV, V and IX); distributing a quantity of cocaine in violation of 21 U.S.C. § 841(a)(1) (Count VIII); distributing a quantity of cocaine in violation of 21 U.S.C. § 959 (Count XII); and distributing unspecified controlled substances in violation of 21 U.S.C. § 959 (Count X).

This appeal is directed primarily at the continuing criminal enterprise conviction.

For reasons that follow, we affirm.

FACTUAL BACKGROUND

Appellant and his four brothers, Benito, Reyes, Maynard and Manuel, were members of an international drug trafficking ring that operated over a six-year period, from 1975-1981. Also involved was Ricky Lee Bowman, the stepson of Benito Montemayor and the government's chief witness at trial. Their operations involved the distribution of marijuana, heroin and cocaine and centered around three main locations: 1) Chicago, Illinois; 2) Monterrey and Cerralvo, Nuevo Leon, Mexico; and 3) McAllen, Texas.

From 1975 through the early part of 1977, their activities were concentrated in the Chicago, Illinois, area. The trailer home of Bowman's parents served as the base of operations for the packaging of marijuana for resale and the counting of drug money. However, the group's operations in this area were not limited to merely packaging marijuana. They also sold heroin and transported marijuana and cocaine from Laredo, Texas.

In September of 1977, the focus of operations shifted to Mexico, where both appellant and his brother, Benito, owned homes. In Monterrey, Mexico, meetings were held with prospective drug purchasers and large quantities of cocaine were collected for importation into the United States.

Operations were also conducted in the vicinity of Cerralvo, Nuevo Leon, where the Montemayor brothers had extensive land holdings. It was in Cerralvo, Nuevo Leon, that appellant maintained a laboratory for the manufacture and distribution of heroin.

By the fall of 1979, drug trafficking operations were being conducted in McAllen, Texas, where both appellant and his brother, Benito, owned homes. Benito often held parties in McAllen to celebrate successfully completed drug transactions. On occasion, cocaine and other controlled substances were dispensed from Benito's home.

The drug trafficking operations came to an end in November of 1981 when a federal grand jury returned the 16-count indictment which forms the basis of this proceeding.

DISCUSSION

As defined by 21 U.S.C. § 848, a person is engaged in a continuing criminal enterprise if 1) he engages in a continuing series of Drug Control Act violations, 2) undertaken in concert with five or more other persons with respect to whom he occupies a position of organizer, supervisor, or other position of management, and 3) from which he obtains substantial income or resources. Noting that the term "continuing series" has been construed as requiring proof of at least three predicate offenses,¹ appellant argues that the evidence adduced at trial was insufficient to establish his guilt on the three substantive counts of the indictment. Central to this argument is the related contention that guilt on the conspiracy counts cannot be used to satisfy the three predicate offenses.

We first address the argument that the evidence was insufficient to sustain a conviction on the three substantive counts of the indictment. In doing so, we are mindful that the evidence must be viewed in light most favorable to the government. *Glasser v. United States*, 315 U.S. 60, 62 S. Ct. 457, 86 L.Ed. 680 (1942).

Count VIII of the indictment charged that in October of 1979, appellant, his four brothers and Alfonse Arrendondo, Jr., distributed cocaine in violation of 21 U.S.C. § 841(a)(1). The incident underlying this count occurred in October of 1979, at the home of Benito Montemayor in McAllen, Texas. Ricky Lee Bowman, an active participant in many of the Montemayor brothers' drug trafficking operations, was staying at Benito's house. He was present at several parties Benito held after successful drug transactions. Bowman testified that, after one such party, Benito directed him to assist in secreting a laundry basket full of controlled substances into a vehicle. According to Bowman, Benito handed him a screwdriver so that he could remove the rear taillights of the vehicle where the drugs would be secreted. Bowman noted that one taillight had already been removed. Bowman testified that he refused to participate because at the time he was married and no longer wished to participate in drug trafficking. When asked on cross-examination whether he actually witnessed the loading of the vehicle, Bowman replied affirmatively, stating: "They had the clothes basket sitting on the tailgate there." (Tr. 246). Bowman further testified that he saw "packages" in the laundry basket (Tr. 248) and that "[e]verybody was there." (Tr. 246).

Appellant argues that the evidence was insufficient to show that the packages contained cocaine, that he participated in the transaction or that anything was actually loaded into the vehicle. We disagree.

It was reasonable for the jury to infer that the packages observed by Bowman in the clothes basket contained cocaine. Bowman testified about a number of prior incidents involving the identical pattern of conduct, whereby packages of cocaine were transferred from a clothes basket to the rear of a vehicle which had been partially dismantled. (Tr. 148-150). Under these circumstances, the jury was entitled to conclude that the pattern was continuing in October of 1979, and that after an all night celebration Benito and the others would hardly make the effort to dismantle the tail portion of a vehicle unless they

intended to secrete contraband therein, as they had done so many times before. Moreover, Bowman's testimony that the party was one of many that celebrated a successful effort at drug trafficking, and that appellant was in attendance at the parties (Tr. 183-184), coupled with Bowman's testimony that on this particular occasion "everyone" was present at the party, permitted the jury to conclude that appellant participated in this transaction.

Count X of the indictment charged appellant and four of his brothers with distributing a quantity of unspecified controlled substances with knowledge that it would be unlawfully imported into the United States, in violation of 21 U.S.C. § 959. The incident underlying this count occurred in Cerralvo, Nuevo Leon, Mexico, in September or October of 1977. At that time, Benito Montemayor was living in a motor home located on a ranch he owned. Bowman testified that on one occasion when he was at the motor home Benito brought in 40 to 45 packages of heroin and declared that they needed to be repackaged. Bowman testified that appellant was one of several people present at the repackaging. While Bowman did not specify which individuals physically participated in the repackaging, the jury could reasonably infer that appellant was more than an innocent bystander.

Appellant argues that the proof was insufficient to establish that the material being repackaged was heroin or any other controlled substance. The proof adduced at trial indicated Bowman was familiar with heroin. He was also well acquainted with Benito Montemayor's operations. Thus, when Benito displayed 40 to 45 small bags and criticized their improper packaging, Bowman could reasonably deduce the nature of the contents within those packages. Such circumstantial evidence was sufficient to permit the jury to conclude that the packages contained heroin. *United States v. Crisp*, 563 F.2d 1242, 1244 (5th Cir. 1977); *United States v. Quesada*, 512 F.2d 1043, 1045 (5th Cir. 1975). Accordingly, we conclude the evidence was sufficient to sustain a conviction on Count X.

Count XII of the indictment charged that appellant and his brother Benito distributed a quantity of cocaine knowing that it would be unlawfully imported into the United States, in violation of 21 U.S.C. § 959. The incident underlying this count took place in Monterrey, Mexico, in September or October of 1977. Bowman testified that on that occasion he was helping secrete bags of cocaine into the rear framework of a van when one of the bags tore open causing cocaine to spill onto the ground. Benito Montemayor observed this happen and began to berate Bowman. Appellant, who was apparently supervising the loading of the cocaine, told Benito to keep quiet and directed Bowman to hose down the area after the van was loaded. Such actions on the part of appellant are more than sufficient to support a jury finding that he was engaged in the distribution of cocaine.

Appellant's culpability on Counts VIII, X and XII can also be premised upon the *Pinkerton* theory of vicarious liability. *Pinkerton v. United States*, 328 U.S. 640, 66 S. Ct. 1180, 90 L.Ed. 1489 (1946). He was shown to have been a member of an international drug trafficking enterprise. As such, he was vicariously liable for any substantive offenses committed by his cohorts in furtherance of that enterprise. The jury, having been properly instructed on the *Pinkerton* theory of vicarious liability, could have based its conviction of appellant on the substantive counts on that theory. See *United States v. Diaz*, 655 F.2d 580, 584-585 (5th Cir. 1981); *United States v. Michel*, 588 F.2d 986, 999 (5th Cir. 1979).

Since we conclude that the evidence was sufficient to sustain appellant's conviction on the three substantive counts, it is unnecessary to decide whether his guilt on the conspiracy counts could have been considered as predicate offenses.

In a related attack on the continuing criminal enterprise conviction, appellant contends the evidence was insufficient to establish that he organized, supervised or managed the group's drug trafficking operations. After review-

ing the record, we have no trouble rejecting this argument.

Ricky Bowman testified on numerous occasions during the trial that appellant was the leader and in charge of the group's activities. His testimony was supported by that of Carlos Gutierrez. Gutierrez testified that between April of 1977 and January of 1978, he purchased approximately 10 one-pound packages of heroin from appellant's brother, Reyes Montemayor. Gutierrez stated that after each of these transactions Reyes would travel to Mexico to account to appellant, who at that time was incarcerated in a Mexican prison. Gutierrez testified that in January or February of 1978, he owed Reyes \$5,000 from a previous purchase. Despite the fact that he could not pay this debt, he met Reyes at a Chicago tavern and requested that he be given another pound of heroin on consignment. Reyes, who had been accompanied to the tavern by appellant and Benito Montemayor, asked Benito whether Gutierrez should be given another chance. Benito turned to appellant, who nodded his head, thereby giving his approval. The next day a pound of heroin was delivered to Gutierrez.

The jury was entitled to consider this evidence as corroborative of Bowman's testimony that appellant was in charge of the drug trafficking operations. We conclude that the evidence was sufficient to support a jury finding that appellant was the supervisor of the group's drug trafficking operations.

Appellant has also challenged the sufficiency of the evidence relating to his acquisition of substantial assets with funds derived from the drug trafficking operations. At trial, the government proved that appellant had acquired a large number of expensive assets during the years that the drug trafficking operations were underway. Appellant contends this evidence is inadequate to support his conviction because the government did not trace the funds used to purchase those assets directly to the criminal enterprise. An identical contention was made in

United States v. Chagra, 669 F.2d 241 (5th Cir. 1982). Rejecting the argument, we stated:

... Where a defendant is on trial for a crime in which pecuniary gain is the usual motive for or natural result of its perpetration and there is other evidence of his guilt, evidence of the sudden acquisition or expenditure of large sums of money by the defendant, at or after the time of the commission of the alleged offense, is admissible to demonstrate the defendant's illegal obtention of those funds. Evidence of this type is admissible even though the government does not specifically trace the source of those funds to the illegal acts charged against the defendant because 'a dishonest acquisition . . . [is] a natural and prominent hypothesis,' 1 J. Wigmore, Evidence § 154, at 601 (1940 & Supp. 1981), explaining the defendant's affluence.

Id. at 256.

With regard to appellant's claim that his property was purchased by Constructora Monte, S.A., a Mexican corporation owned by the Montemayor family, the record reflects: 1) that the corporation did not have adequate earnings in dollars to make the luxurious purchases in question; 2) that the purchases had little, if any, relationship to the business of the corporation; 3) that the purchases were made in cash; 4) that appellant failed to introduce even a single check drawn on a corporate account to support his argument that the corporation provided the funds; and 5) that Benito Montemayor had acknowledged that the corporation was nothing more than a front for illegal operations.

In light of the above, we conclude that the evidence was sufficient to support a jury finding that appellant acquired substantial assets with funds derived from the drug trafficking operations.

OTHER ARGUMENTS

Appellant makes a number of additional arguments which he contends require reversal.

First, he contends that his conviction should be reversed because at trial a witness made reference to his prior imprisonment in Mexico. The incident occurred when appellant's counsel was cross-examining Carlos Gutierrez, a Spanish-speaking witness. Gutierrez was asked to explain the time periods elapsing between deliveries of heroin by Reyes Montemayor. Evidently believing Gutierrez was confused by the question, the court intervened:

THE COURT: But what he is trying to ask you is this. I believe you said that sometimes it would take you one week and sometimes two weeks and one time three days to sell heroin. That's the way I understood your testimony. Is that correct?

The Witness: That's right.

THE COURT: But over what times would Mr. Montemayor make the deliveries to you? Was it once a month or once every two months, or how were those deliveries spaced?

The Witness: Reyes Montemayor would go to Mexico—

Mr. Szekely: Your Honor, I object. That's not responsive to the question asked. I was trying to establish a time frame.

THE COURT: I will overrule your objections. This is the way he is doing it, I suppose.

The Witness: Reyes Montemayor would go to Mexico once a week or once every two weeks to account to Matias Montemayor, and that is why Reyes Montemayor would tell me, 'Brother, wait a while'—

THE COURT: Cousin.

The Witness: Cousin. Wait a while for me to go talk to Matias at the prison. But Matias was about to leave or had already left—

THE COURT: No, about to be released. (Tr. Vol. 5, pp. 66, 67).

Appellant contends that the admission of this testimony violated the well-established rule that evidence of prior crimes cannot be introduced to show a defendant's criminal character or his propensity to commit crimes. See Federal Rules of Evidence 404(b). We disagree.

Evidence of prior criminal conduct is admissible if relevant for a purpose other than showing criminal character. See, e.g. *United States v. Payne*, 467 F.2d 828 (5th Cir. 1972); *United States v. Davis*, 464 F.2d 558 (5th Cir. 1972). In this case, an essential element of appellant's continuing criminal enterprise conviction was his status as the "king pin" overseeing the group's drug trafficking operations. The testimony of Gutierrez was relevant to that issue. It tended to show the dominating influence that appellant had over Reyes Montemayor, even at a time when appellant was incarcerated in another country. In this context, the evidence was properly admitted. See *United States v. Sutherland*, 463 F.2d 641 (5th Cir. 1972); *United States v. Abshire*, 471 F.2d 116, 118 (5th Cir. 1972). [The inclusion of references to 'jail' or 'prison' does not disqualify essential, otherwise relevant, testimony].

As an alternative argument, appellant urges that the trial court erred in failing to give a cautionary instruction limiting the purposes for which the jury could consider the evidence of prior imprisonment. While the giving of such an instruction would have been appropriate, no request for such an instruction was made. In view of the overwhelming evidence of appellant's guilt and the fact that no further reference was made to the prison remark, we cannot say the failure to give such an instruction was plain error. If error at all, it was harmless.

Appellant's next assignment of error is directed at the court's charge to the jury. He points to several comments contained in the charge which he contends effectively instructed the jury to return a verdict of guilty.² Because the record reflects that appellant's counsel objected to only one of the comments, we restrict our review accordingly. See Federal Rules of Criminal Procedure 30.

The particular comment objected to occurred when the trial court instructed the jury on the credibility of witnesses. During closing arguments, appellant's counsel had insinuated that there was something illegal about government agents paying informants and purchasing drugs. In explaining that such conduct was not illegal, the court stated:

Now, you weigh each witness. When a witness takes the stand, and before that witness utters a word, he comes to you with a clean slate, whether it's a defendant or whether it's an officer or whether it's any other person, and then you hear that person out.

There were some comments, for example, in the arguments, some criticism about the fact that the government pays informants or pays expenses or buys drugs. There is nothing illegal about that. As a matter of fact, the Congress has appropriated funds for that purpose as a means of taking drugs off the market, keeping them from the hands of addicts and of apprehending those that would violate our laws pertaining to narcotics and drugs. And there is nothing wrong with that.

The alternatives to that are something far more expensive to the taxpayers, in the form of addiction and the crimes that an addict may commit. (Tr. 878-879).

When viewed in the context of the closing arguments of appellant's counsel, this comment was not improper. The trial court was careful not to imply that the practice lent credence to any witness or that the court itself believed or disbelieved anyone. Moreover, the court went on to charge the jury:

But, on the other hand, the testimony of a person such as an accomplice or an informant who provides evidence in a case for pay or for immunity from punishment or for personal advantage of any kind must always be examined and weighed by the jury with greater care and caution than that of an ordinary witness. You must decide, as jurors, whether the witness' testimony is affected by any of these circumstances or his interest in the outcome of the case or any prejudice or resentment he may bear a defendant.

So if you determine that the testimony of such a witness is affected by those circumstances, any one or more of those factors, then you should keep in mind that testimony should always be received with caution and weighed with great care, and you should never convict a defendant on the unsupported testimony of such a witness unless you believe that testimony beyond a reasonable doubt. (Tr. 879-880).

The trial court's comment was not prejudicial to appellant.

We have carefully examined the remainder of the court's charge and can find no plain error. When read as a whole, the charge presents a complete and impartial recitation of the law applicable to this case. No more is required under the law.

The remaining contentions asserted by appellant include the following:

1. That the indictment should have been dismissed because of government misconduct before the grand jury;
2. That the trial court impermissibly restricted his cross-examination of a government witness;
3. That the trial court erred in receiving into evidence a Drug Enforcement Agency evidence submission form; and

4. That the trial court should have declared a mistrial after an unadmitted Drug Enforcement Agency lab report was inadvertently sent to the jury during deliberations.

We have carefully reviewed the record and conclude that none of these claims constitute reversible error.

CONCLUSION

For the reasons given, appellant's conviction is affirmed on all counts.

AFFIRMED.

[Footnotes appended]

X X X

FOOTNOTES

¹ *United States v. Valenzuela*, 596 F.2d 1361 (9th Cir. 1979); *United States v. Chagra*, 653 F.2d 26 (1st Cir. 1981).

² A judge in a federal criminal trial has the right to summarize and comment upon the evidence and the inferences to be drawn therefrom, to insure that the facts are accurately brought out. *United States v. Lee*, 422 F.2d 1049 (5th Cir. 1970). However, in doing so he must make clear to the jury that they are the sole judges of the facts and are not bound by his comments. *Moody v. United States*, 377 F.2d 175 (5th Cir. 1967). The district judge was careful to so instruct the jury in this case.

APPENDIX 2

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-2249

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MATIAS MONTEMAYOR-DE LA PAZ,

Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Texas

(October 6, 1983)

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion 8/5/83, 5 Cir. 1983, F.2d)

Before RUBIN and TATE, *Circuit Judges*, and DAVIS*,
District Judge.

* District Judge of the Western District of Louisiana, sitting by designation.

PER CURIAM:

Appellant complains in his application for rehearing that we failed to consider his second assignment of error. In issue 2, appellant asserted that the trial court erred in failing to confine the government's proof to the indictment as amplified by the bill of particulars.

The appellant focuses on a response made by the government to defendant's request for bill of particulars as to count 2. In that response, the government informed the defendant that it would be relying on predicate acts committed during September or October 1977.

From other discovery and from the language in the indictment itself, defendant was apprised that the government would offer proof of violations which occurred at times other than September-October, 1977. The defendant showed no surprise or prejudice. Under these circumstances, it was within the trial court's discretion to permit the government to establish and rely on acts committed at times other than September-October, 1977. See *United States v. Diecidue*, 603 F.2d 535, 563 (5th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980) and *United States v. Johnson*, 575 F.2d 1347, 1356-57 (5th Cir. 1978), *cert. denied*, 440 U.S. 907 (1978).

The other assignments of error were either covered expressly or implicitly.

For these reasons, the petition for rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

APPENDIX 3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

UNITED STATES OF AMERICA, *

VS

* CRIMINAL NO. B-81-811

MATIAS MONTEMAYOR-DE LA PAZ,*

ANSWER TO DEFENDANT'S MOTION FOR
BILL OF PARTICULARS AS TO COUNT 2

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the United States Attorney for the Southern District of Texas by and through John Patrick Smith, Assistant United States Attorney, and states that:

1. Persons supervised by MATIAS MONTEMAYOR-DE LA PAZ in a continuing criminal enterprise are, but not limited to, the below listed:

Benito Montemayor-De La Paz
Reyes Montemayor-De La Paz
Manuel Montemayor-De La Paz
Meynardo Montemayor-De La Paz
Eva Montemayor-De La Paz
Rich Bowman
Nellie Olinger
Salvador Flores
Aliphonso Arredondo
Eufracio Garcia
"Roger"
"Diablo"
"Blueboy"

2. The above listed persons were supervised in, but not limited to, the Chicago, Illinois, area; McAllen, Texas; Monterrey, Mexico; and Cerralvo, N.L., Mexico.

3. The above persons were placed in positions of, but not limited to, overseers, loaders, drivers, money counters, chemists, body guards and guards, and safekeepers of contraband at stash locations.

4. (a) The date of the criminal act was during the months of September or October of 1977.

(b) The location of the offense was Benito Montemayor's home on 32A Street, Colonia Las Crumbres, Monterrey, N.L., Mexico.

APPENDIX 4

* * *

collectively. My question is this: Did any of you examine those two exhibits, Defendants' Exhibits 1 and 2, which were—I will tell you what they were. They would have been the report of the chemist, Mr. Albers, who testified in this case. Did any one of you see those exhibits or examine those exhibits when they were in the jury room? You did see them?

A JUROR: I read them both, Your Honor.

THE COURT: You did see them both?

A JUROR: Yes, sir.

THE COURT: Did you look at them?

A JUROR: I looked at them to verify the date of the vacuuming of both the vehicle and the pool table.

THE COURT: You may be seated. Several of the others also examined those exhibits?

A JUROR: I did. I saw them and—

THE COURT: Don't tell me what you did. You did look at the exhibits?

A JUROR: Yes.

THE COURT: Then some of the jurors did look at the exhibits, and I want the record to so reflect.

All right, jurors, this will conclude your service in this case. I do not know what other instructions you have received from the Clerk pertaining to any service in the future, but this concludes this

* * *

No. 83-937

Office - Supreme Court, U.S.

FILED

FEB 28 1984

ALEXANDER L. STEVAS,

In the Supreme Court of the United States

OCTOBER TERM, 1983

MATIAS MONTEMAYOR DE LA PAZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE

Solicitor General

STEPHEN S. TROTT

Assistant Attorney General

MARGARET I. MILLER

Attorney

Department of Justice

Washington, D.C. 20530

(202) 633-2217

QUESTIONS PRESENTED

1. Whether an isolated reference at trial to petitioner's prior incarceration constituted reversible error.
2. Whether the trial court exhibited bias against petitioner in its instructions to the jury.
3. Whether the trial court committed reversible error by failing to instruct on the lesser included offense of conspiracy in violation of 21 U.S.C. 846.
4. Whether the trial court correctly instructed the jury concerning the continuing criminal enterprise offense.
5. Whether the evidence was sufficient to sustain petitioner's convictions.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	5
Conclusion	17

TABLE OF AUTHORITIES

Cases:

<i>Cupp v. Naughten</i> , 414 U.S. 141	8
<i>Glasser v. United States</i> , 315 U.S. 60	16
<i>Horning v. District of Columbia</i> , 254 U.S. 135	8
<i>Jeffers v. United States</i> , 432 U.S. 137	10, 11
<i>Llewellyn v. Stynchcombe</i> , 609 F.2d 194	10
<i>Paz v. United States</i> , 462 F.2d 740, cert. denied, 414 U.S. 820	10
<i>Pinkerton v. United States</i> , 328 U.S. 640	14, 15
<i>Quercia v. United States</i> , 289 U.S. 466	8
<i>United States v. Barnes</i> , 604 F.2d 121, cert. denied, 446 U.S. 907	11
<i>United States v. Bruscino</i> , 687 F.2d 938, cert. denied, Nos. 82-5575 and 82-5585 (Feb. 22, 1983)	10

IV

Page

Cases—Continued:

<i>United States v. Diecidue</i> , 603 F.2d 535, cert. denied, 445 U.S. 946	14
<i>United States v. Johnson</i> , 575 F.2d 1347, cert. denied, 440 U.S. 907	14
<i>United States v. Lerma</i> , 657 F.2d 786, cert. denied, 455 U.S. 921	7
<i>United States v. Lovasco</i> , 431 U.S. 783	10
<i>United States v. Lurz</i> , 666 F.2d 69, cert. denied, 455 U.S. 1005	10-11
<i>United States v. Maestas</i> , 546 F.2d 1177	6
<i>United States v. Martinez</i> , 604 F.2d 361, cert. denied, 444 U.S. 1034	7
<i>United States v. Michel</i> , 588 F.2d 986, cert. denied, 444 U.S. 825	14
<i>United States v. Partin</i> , 552 F.2d 621, cert. denied, 434 U.S. 903	8
<i>United States v. Quesada</i> , 512 F.2d 1043, cert. denied, 423 U.S. 946	16
<i>United States v. Sperling</i> , 506 F.2d 1323, cert. denied, 420 U.S. 962	11
<i>United States v. Staples</i> , 445 F.2d 863, cert. denied, 404 U.S. 1048	10
<i>United States v. Witt</i> , 618 F.2d 283, cert. denied, 449 U.S. 882	7
<i>United States v. Young</i> , 655 F.2d 624	10

Statutes and rules:

21 U.S.C. 841(a)(1)	1, 2
21 U.S.C. 846	10, 11
21 U.S.C. 848	1, 10, 11, 12, 13
21 U.S.C. 848(a)(2)	4
21 U.S.C. 959	2

Fed. R. Crim. P. :

Rule 16	13
Rule 30	8, 10
Fed. R. Evid. 404	6

Miscellaneous:

2 Devitt & Blackmar, <i>Federal Jury Practice and Instructions</i> (3d ed. 1977)	11
--	----

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-937

MATIAS MONTEMAYOR DE LA PAZ, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 5, 1983. A petition for rehearing was denied on October 6, 1983 (Pet. App. 14a-15a). The petition for a writ of certiorari was filed on December 5, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848 (Count 2); conspiracy to manufacture and distribute heroin and marijuana, in violation of 21 U.S.C. 841(a)(1) and 959 (Counts 3, 4, 5, and 9); distribution of

(1)

cocaine in the United States, in violation of 21 U.S.C. 841(a)(1) (Count 8); distribution of unspecified controlled substances, in violation of 21 U.S.C. 959 (Count 10); and distribution of cocaine outside the United States for importation to this country, in violation of 21 U.S.C. 959 (Count 12). He was sentenced to a term of 55 years' imprisonment and fined \$100,000 on Count 2. In addition, forfeiture of certain items of petitioner's property was ordered in accordance with the jury's supplemental verdict. The sentences of imprisonment and fines on all other counts were to run concurrently with those imposed on Count 2. The district court imposed consecutive special parole terms of three years (Count 8), two years (Count 10), and three years (Count 12), to run concurrently with the sentence on Count 2.

1. The evidence at trial (see Pet. App. 2a-7a) showed that from 1975 through late 1981 petitioner and his four brothers engaged in a drug trafficking operation involving the distribution of marijuana, cocaine, and heroin, primarily in Chicago, McAllen, Texas, and Mexico. Petitioner was regarded as the leader of the five brothers (Tr. 147, 150, 174).

Ricky Lee Bowman, a stepson of one of petitioner's brothers, was the government's chief witness at trial (Tr. 124). Bowman testified that he was recruited to join the drug operation in 1975 (Tr. 125-128). Working out of his parents' trailer home in Chicago, Bowman packaged marijuana for resale and counted money. Bowman's stepfather, Benito Montemayor, directed this work; Bowman's mother and Salvador Flores also assisted. Two or three times each week Benito, Flores, Bowman and Bowman's mother each counted a stack of \$20,000 to \$30,000 in cash (Tr. 137, 256-257). Benito explained to Bowman that the money was not his and that if Bowman erred in counting it "Mat" (i.e., petitioner) would "kick his rear end" (Tr. 128). Although

petitioner never participated in the activities in which Bowman was involved, Bowman saw petitioner pick up the money on one occasion in 1976 (Tr. 258). During this period Flores made 15 to 20 trips to Laredo, Texas, on each occasion returning to Chicago with marijuana or cocaine concealed in a van (Tr. 129-132). The conspirators also engaged in heroin transactions in this period, including a sale to a DEA agent in March 1976 (Tr. 84-85, 88-106, 123-124).

In September 1977, Bowman, Benito, and Benito's wife and children left Chicago and moved to a house owned by Benito in Monterrey, Mexico (Tr. 143-144). Thereafter, Bowman aided the Montemayor brothers (including petitioner, who also owned a house in Monterrey (Gov't Exh. 8; Tr. 145)) in cocaine trafficking, either by secreting cocaine in a van or by counting money. Benito or petitioner supervised the hiding of the cocaine after dark. The rear tail lights of a van would be removed and an aluminum panel dismantled. Then bags of cocaine, usually in a clothes basket, would be placed in the aperture, and the panel and tail lights would be replaced. Tr. 145-150.

Petitioner and Bowman also helped unload cash delivered to Benito's house by van. Petitioner, Bowman, Benito, and other members of the drug operation counted the money under petitioner's supervision. Tr. 146-147. Bowman alone counted amounts ranging from \$100,000 to \$500,000 (Tr. 147). Late at night, after the money had been counted, the president of a local bank would pick it up (Tr. 147-148).

The Montemayor brothers gathered frequently at a brothel in Monterrey to discuss their drug business and to meet with prospective purchasers. Petitioner presided over the meetings. Tr. 172-174. The brothers also organized a construction company, which Benito described to Bowman as a

"front" for a Mexican criminal syndicate (Tr. 174-175). In November 1977, petitioner, his brothers, and Bowman visited petitioner's heroin laboratory in Mexico (Tr. 161-162).

Following his marriage in the fall of 1979, Bowman moved to McAllen, Texas. Bowman helped his stepfather host parties, which were held following each successful completion of a drug transaction. During a three-week period, there were five to seven such parties, which petitioner attended. Following one of these parties, Benito Montemayor directed Bowman to help two other individuals load drugs into the rear well of a Chevrolet Blazer. Tr. 182-187.¹

Petitioner presented no substantive evidence to refute the government's account of his involvement in the drug trafficking operations. The evidence he presented related only to whether certain items of his property were subject to forfeiture under 21 U.S.C. 848(a)(2) because they had been obtained with the profits of a continuing criminal enterprise.

2. The court of appeals affirmed petitioner's convictions (Pet. App. 1a-13a). The court concluded that there was sufficient evidence to sustain the convictions on the three substantive counts of the indictment, and that the evidence supported the conclusions that petitioner was the supervisor of the drug trafficking operations and had acquired numerous expensive assets with funds derived from those operations (*id.* at 3a-8a). The court also held that a brief reference at trial to petitioner's earlier incarceration in

¹In April 1981, Benito Montemayor's Chevrolet Blazer was seized and impounded by law enforcement officers (Tr. 434-435). In October and November 1981, authorities vacuumed the rear of that vehicle, as well as Benito Montemayor's pool table. They found traces of cocaine in both sweepings. Tr. 474-475, 479-480.

Mexico did not constitute error and that the reference was harmless in any event (*id.* at 9a-10a). In addition, the court of appeals held that the trial court's instructions to the jury were not improper and that, "[w]hen read as a whole, the charge presents a complete and impartial recitation of the law applicable to [the] case" (*id.* at 12a). The court noted finally that other contentions presented by petitioner were without merit (*id.* at 12a-13a).

ARGUMENT

1. Petitioner contends (Pet. 11-14) that the trial court erred in questioning a witness and subsequently refusing to grant a request for a mistrial based on the witness's reference to petitioner's earlier incarceration in a Mexican prison. That contention is without merit.

When considered in context, it is clear that the trial court's questioning and the witness's response were entirely appropriate. On cross-examination of Carlos Gutierrez, a Spanish-speaking witness, defense counsel asked a series of questions concerning the time periods that elapsed between each delivery of heroin by co-defendant Reyes Montemayor. The court intervened, apparently in the belief that Gutierrez was confused by the question (Tr. 66):

THE COURT: But what he is trying to ask you is this. I believe you said that sometimes it would take you one week and sometimes two weeks and one time three days to sell the heroin. That's the way I understood your testimony. Is that correct?

THE WITNESS: That is right.

THE COURT: But over what times would Mr. Montemayor make the deliveries to you? Was it once a month or once every two months, or how were those deliveries spaced?

THE WITNESS: Reyes Montemayor would go to Mexico —

Defense counsel then objected that he only wished to establish a time frame. The court overruled the objection, explaining that it appeared that the witness was trying to describe the time frame in his own way. The witness then continued to testify (Tr. 67):²

THE WITNESS: Reyes Montemayor would go to Mexico once a week or once every two weeks to account to Matias Montemayor, and that is why Reyes Montemayor would tell me, "Brother, wait a while"—

THE COURT: Cousin.

THE WITNESS: "Cousin, wait a while for me to go talk to Matias at the prison, but Matias was about to leave or had already left."—

THE COURT: No, about to be released.

Defense counsel moved for a mistrial because of the reference to petitioner's imprisonment, and the court denied the motion (Tr. 68-73).

The court of appeals correctly concluded that the trial court did not err in refusing to declare a mistrial. As the court of appeals noted (Pet. App. 10a), the reference to petitioner's prior incarceration was relevant because it showed the influence petitioner had over his brother and over the drug trafficking operation; any prejudicial effect on petitioner was incidental and would not require exclusion of the statement. See *United States v. Maestas*, 546 F.2d 1177, 1181 (5th Cir. 1977); Fed. R. Evid. 404. Moreover, as the trial court observed (Tr. 68-71), defense counsel took the risk and invited the response with his line of cross-examination about the time frame of the transactions. Thus, petitioner cannot now urge that the response

²During this exchange, the trial judge (who speaks fluent Spanish) was correcting the interpreter's translation errors. See Tr. 67-68.

constitutes reversible error. See *United States v. Lerma*, 657 F.2d 786, 788 (5th Cir. 1981), cert. denied, 455 U.S. 921 (1982); *United States v. Witt*, 618 F.2d 283, 287 (5th Cir.), cert. denied, 449 U.S. 882 (1980); *United States v. Martinez*, 604 F.2d 361, 366 (5th Cir. 1979), cert. denied, 444 U.S. 1034 (1980). The trial court's participation in the questioning was merely an attempt to clarify an area of inquiry opened up by defense counsel.

Although the trial court mentioned that it would instruct the jury concerning the reference to petitioner's prior incarceration, it never did so, presumably because defense counsel never followed up with a request for such an instruction. However, the testimony at issue was brief and occurred early in the trial. None of the parties referred to it during the remainder of the trial. In those circumstances, it seems clear that petitioner was not prejudiced by the court's failure to give a limiting instruction.³

2. Petitioner also contends (Pet. 16-20) that the trial court's charge to the jury was biased. That contention lacks merit. The court of appeals correctly concluded that, when viewed as a whole, the trial court's instructions in this case were "a complete and impartial recitation of the law applicable to [the] case" (Pet. App. 12a).

³Petitioner also complains (Pet. 14-16) that the trial court (1) refused to permit his counsel to question a witness about voice print identification; (2) improperly permitted the prosecutor to explain to the jury what certain exhibits depicted prior to their introduction into evidence and refused to allow defense counsel to question Bowman about several exhibits he was unable to identify; (3) improperly elicited from Bowman an identification of petitioner; (4) improperly questioned another witness regarding the purchase of petitioner's airplane; (5) wrongly allowed the government to introduce a "hearsay Drug Enforcement Administration report" and other "hearsay business records" into evidence and (6) unfairly identified one of petitioner's co-defendants for a witness. However, petitioner does not cite any authority for the proposition that these actions and rulings were erroneous, and he fails to explain how he was prejudiced by them.

It is well established that a trial court may comment on and summarize the evidence for the jury, so long as it does so fairly and in a manner that leaves the ultimate determination of relevant facts to the jury. See, e.g., *Quercia v. United States*, 289 U.S. 466, 469 (1933); *Horning v. District of Columbia*, 254 U.S. 135, 138 (1920). Any individual instruction must be viewed in light of the charge as a whole. See *Cupp v. Naughten*, 414 U.S. 141, 146-147 (1973).

Petitioner picks out several isolated comments from a closing charge that covers 48 pages of the transcript (Tr. 870-918). In particular, he faults the trial court for explaining that there was nothing illegal or improper about the government's expenditures to pay informants or to buy drugs (Tr. 879). But that instruction was an entirely proper response to defense counsel's insinuations during closing argument that this practice was improper (Tr. 807-808, 812-814, 837). The court did not imply that the informant was credible because he had been paid by the government or that the court itself believed or disbelieved anyone (see Tr. 923-924). See *United States v. Partin*, 552 F.2d 621, 645 (5th Cir.), cert. denied, 434 U.S. 903 (1977). Indeed, the court instructed the jury that the testimony of "an informant who provides evidence in a case for pay * * * must always be examined and weighed by the jury with greater care and caution than that of an ordinary witness" (Tr. 879).

Petitioner failed to object at trial to the remaining instructions he cites (Pet. 18-20). See Fed. R. Crim. P. 30. Had he done so, the court might have provided clarification that would have eliminated any possible confusion arising from, e.g., the terminology used to explain the complex elements of a continuing criminal enterprise. In any event, even the portions of the jury instructions quoted out of context by petitioner do not require the jury to return a guilty verdict on any count or otherwise reflect judicial bias.

When taken in context, it is clear that they form part of an entirely appropriate charge.

Following his discussion of the jury instructions, petitioner notes (Pet. 20) that two laboratory reports were mistakenly sent to the jury and that several jurors saw them. The reports showed that traces of cocaine had been found on a pool table belonging to petitioner's brother and in a truck Bowman identified as having been used to carry bags of cocaine. The reports were labeled as Defendants Exhibits 1 and 2 in connection with a pretrial hearing on a defense claim. Although the chemist who prepared the reports testified at trial, the reports themselves were not introduced into evidence.

Petitioner does not suggest how he was prejudiced by the fact that several jurors saw the reports. Moreover, the trial court instructed the jury not to consider the reports (Tr. 936):

And I don't know whether you have looked at them or not. But if you have looked at them, I am going to instruct you not to consider anything that might have been in those reports. Just pretend you didn't see them.

The court added that the jury was entitled to consider the chemist's trial testimony "for whatever weight you want to give it, but do not consider anything in those exhibits" (*ibid.*). Following the verdict, the court conducted an inquiry into whether the jurors had seen the reports in the jury room (Tr. 990-991). In a written order denying a new trial (1 R. 1255-1259), the court correctly concluded that the jury's exposure to the reports during deliberations did not prejudice petitioner because the exhibits contained only technical data, were not inflammatory, did not relate to an issue hotly contested at trial, and were largely cumulative to the chemist's testimony. In these circumstances, the inadvertent exposure of the jurors to the reports did not

constitute reversible error. See, e.g., *United States v. Brusino*, 687 F.2d 938 (7th Cir. 1982) (en banc), cert. denied, Nos. 82-5575 and 82-5585 (Feb. 22, 1983); *Llewellyn v. Stynchcombe*, 609 F.2d 194, 195-196 (5th Cir. 1980); *Paz v. United States*, 462 F.2d 740, 746 (5th Cir. 1972), cert. denied, 414 U.S. 820 (1973); *United States v. Staples*, 445 F.2d 863 (5th Cir. 1971), cert. denied, 404 U.S. 1048 (1972).

3. a. Petitioner asserts (Pet. 20-24) that the trial court erred in failing to instruct the jury that a conspiracy charge under 21 U.S.C. 846 is a lesser included offense of the Section 848 continuing criminal enterprise offense, citing *Jeffers v. United States*, 432 U.S. 137, 153 (1977) (plurality opinion). Petitioner did not raise this question on appeal, and the court of appeals did not consider it; it is therefore not properly raised here. See *United States v. Lovasco*, 431 U.S. 783, 788 n.7 (1977). Moreover, since petitioner never requested the lesser included offense instruction, he cannot claim it as error on appeal. See Fed. R. Crim. P. 30. Cf. *Jeffers v. United States*, 432 U.S. at 154; *United States v. Young*, 655 F.2d 624, 627 (5th Cir. 1981). In any event, in view of the substantial evidence of petitioner's guilt of the continuing criminal enterprise charge (see Pet. App. 3a-8a), the trial court's failure to give a lesser included offense instruction on the conspiracy charge does not amount to plain error.

b. Petitioner also claims (Pet. 22) that the trial court erred in failing to instruct the jury that it was required to consider whether petitioner committed three specific underlying substantive violations before considering the remaining elements of a continuing criminal enterprise.⁴ But the

⁴In fact, the government was not required to obtain three substantive convictions in order to establish a violation of 21 U.S.C. 848. See *United States v. Lurz*, 666 F.2d 69, 78 (4th Cir. 1981), cert. denied, 455

jury in fact found beyond a reasonable doubt that he committed the three substantive drug offenses charged in the indictment. As the court of appeals concluded (Pet. App. 6a), the evidence was sufficient to sustain petitioner's conviction on those three counts. Thus, even if the trial court erred in failing to give the instruction for which petitioner contends, he suffered no prejudice.⁵

U.S. 1005 (1982); *United States v. Barnes*, 604 F.2d 121, 155-158 (2d Cir. 1979), cert. denied, 446 U.S. 907 (1980).

Petitioner cites (Pet. 22) 2 Devitt & Blackmar, *Federal Jury Practice and Instructions* § 58.21 (3d ed. 1977), for the proposition that guilt of certain substantive charges is a precondition to conviction on a continuing criminal enterprise count. But Devitt and Blackmar merely note that the sample instruction was given by the trial court in *United States v. Sperling*, 506 F.2d 1323 (2d Cir. 1974), cert. denied, 420 U.S. 962 (1975), also cited by petitioner. The Second Circuit in *Sperling* did not discuss the propriety of the charge or suggest that conviction on the substantive offenses was necessary to the conviction under Section 848. See 506 F.2d at 1344. Nor do Devitt and Blackmar suggest that such a charge is necessary. Instead, they state (2 Devitt & Blackmar, *supra*, § 58.21, at 470-471) (emphasis added):

This charge [*i.e.*, continuing criminal enterprise] could be prosecuted separately but in the normal course of events would probably be tried along with substantive charges under Title 21, U.S.C. In such a case the finding of guilt on the other charges *could* be made a condition of conviction under Sec. 848.

⁵Petitioner suggests (Pet. 22) that because the trial court failed to instruct the jury that they must consider whether he committed three substantive offenses before convicting him of the Section 848 charge there is no way to determine which three drug felonies the jury used as the basis for the continuing criminal enterprise conviction. Petitioner contends that his sentence therefore may violate the constitutional prohibition against multiple punishments, since this Court has held that Congress did not intend to impose cumulative penalties under Section 848 and the underlying offenses used to prove that violation, citing *Jeffers v. United States*, *supra*. But in *Jeffers* the Court did not hold that cumulative penalties for violation of Section 848 and the underlying substantive offenses were improper; instead, it held only that Congress did not intend to impose cumulative penalties under Section 846 (the conspiracy provision) and Section 848. See 432 U.S. at 154-158,

c. Petitioner claims (Pet. 22-23) that the trial court also erred in instructing the jury that the predicate acts required for a continuing criminal enterprise conviction could be established by any drug violation proved by the evidence. Petitioner contends that the court should have limited the proof of predicate acts to those the government listed in connection with Count 2 in its response to petitioner's request for a bill of particulars. That claim lacks merit.

The continuing criminal enterprise count charged that the crime occurred from 1970 to the date of the indictment (November 17, 1981). Prior to trial petitioner moved for a bill of particulars, requesting, inter alia, the names and whereabouts of the individuals he was alleged to have organized, supervised or managed, the precise nature of his superior-subordinate relationship as to each, "the exact violations that the Defendant managed the foregoing people * * *," and the "precise" object of the enterprise (1 R. 1096-1097). At a pretrial hearing, the government provided a response that listed 13 individuals whom it claimed were subordinate to petitioner and indicated that the activities at issue occurred in Chicago, McAllen, Monterrey, and Cerralvo, Mexico. The government stated that the "date of the criminal act" was "during the months of September or October of 1977" and that the offense had occurred at Benito Montemayor's house in Monterrey. The government also stated that petitioner had "supervised through, but not limited to, direct oral commands the unloading of a large load of cocaine from the tail light areas of a Chevrolet Suburban. When an altercation between the persons being supervised arose, [petitioner] took direct command * * *."

160. In any event, the district court did not impose any cumulative sentences on petitioner; his sentences on Counts 3 through 12 are to run concurrently with the sentence he received on Count 2 (the Section 848 charge). See page 2, *supra*.

The government described the object of the enterprise as including the manufacture, importation and distribution of heroin, cocaine and marijuana. 1 R. 1139-1140.

After reviewing the government's response at the pretrial hearing, petitioner's counsel objected that it was inadequate because it failed to set forth with particularity the precise acts of misconduct constituting the predicate for prosecution under 21 U.S.C. 848. The prosecutor replied that the government's response to the request for a bill of particulars was not intended to limit the proof. He noted that under the law of the Fifth Circuit the government was not required to reveal its evidence or theory of prosecution and that the indictment adequately informed petitioner of the charge against which he had to defend. Mar. 9, 1982 Tr. 31-32. The trial court noted that petitioner had been made aware of the government's case through his involvement in a hearing on a related civil forfeiture claim, as well as through extensive discovery under Fed. R. Crim. P. 16. Indeed, the court noted that petitioner had had "probably more pretrial discovery than any criminal case I ever heard of about the facts of the case and about the proof of the Government." Mar. 9, 1982 Tr. 33. The court agreed that a bill of particulars was not needed, and it rejected petitioner's request that the government specify the precise predicate acts. *Id.* at 32-33, 35.

The prosecutor's statements at the pretrial hearing make it clear that the government's response to petitioner's request for a bill of particulars did not restrict its ability to present evidence of acts not mentioned therein. The response did not specifically identify the predicate acts, and the trial court held that the government was not required to provide that information. The response referred at various points to petitioner's supervisory conduct in Chicago, McAllen, and Cerralvo, as well as in Monterrey, and described a number

of objectives of the enterprise. Thus, petitioner could not have been prejudiced by the failure to limit the government's proof to events occurring in September and October 1977.

Moreover, Count 2 charged a conspiracy-like offense. It is well established that in conspiracy trials the government may prove overt acts not stated in the indictment or a bill of particulars. See, e.g., *United States v. Diecidue*, 603 F.2d 535, 563 (5th Cir. 1979), cert. denied, 445 U.S. 946 (1980); *United States v. Johnson*, 575 F.2d 1347, 1357 (5th Cir. 1978), cert. denied, 440 U.S. 907 (1979). Finally, a bill of particulars may be amended at any time, and a trial court's decision to allow such an amendment should not be reversed unless the claimant can show actual prejudice. See *United States v. Johnson*, 575 F.2d at 1356-1357. The record does not indicate that petitioner was surprised by any evidence adduced at trial. Indeed, the jury charge petitioner requested would not have limited the evidence of predicate acts to September and October 1977 (1 R. 1197). Thus, the trial court's refusal to limit the evidence in the manner sought by petitioner was not erroneous.

4. Petitioner contends (Pet. 24-25) that the jury charge was erroneous because it permitted a finding of guilt on the continuing criminal enterprise charge based on the vicarious liability principle of *Pinkerton v. United States*, 328 U.S. 640 (1946), and that the *Pinkerton* charge was inadequate in any event. These claims are without merit.

In *United States v. Michel*, 588 F.2d 986, 999, cert. denied, 444 U.S. 825 (1979), the Fifth Circuit held that "*Pinkerton* and its progeny [are] equally applicable to defendants charged with either conspiracy to violate the drug laws or a section 848 continuing criminal enterprise." In *Michel* the court reasoned that the *Pinkerton* vicarious

liability rationale is based on an agreement among co-conspirators under which they are partners in crime and an act of one in furtherance of the plan is the act of all. This partnership also is present, the court recognized, in the conduct of a continuing criminal enterprise, because the statute requires that a person act in concert with five or more other individuals. Thus, the court concluded, if the government proves the requisite concert of action, all members of the enterprise, including the manager, are responsible for the substantive offenses committed by each member during the course of and in furtherance of the plan. That holding is correct and does not conflict with any decision of this Court or any other court of appeals.

Contrary to petitioner's claim (Pet. 25), the trial court did not err in failing to instruct the jury that petitioner's liability was limited to "foreseeable" acts of his co-conspirators. Petitioner did not object at trial to the omission of such language from the *Pinkerton* charge. In any event, the court's charge did not subject petitioner to "unlimited criminal responsibility" (Pet. 25). The court properly limited petitioner's vicarious liability to offenses committed by co-conspirators "during the course and in furtherance of the [criminal] plan" (Tr. 891).⁶

5. Petitioner claims finally (Pet. 26-27) that there was insufficient evidence to support his convictions. Of course, the evidence must be viewed in the light most favorable to

⁶Petitioner suggests (Pet. 25) that the *Pinkerton* charge went too far by allowing the jury to hold him responsible for Salvador Flores' "marijuana trips" (see page 3, *supra*) when there was no evidence that he was a member of the conspiracy at the time Flores made these trips. But Bowman testified that on one occasion in 1976 petitioner came to the trailer where other conspirators were bagging the marijuana and counting the money they had collected from selling it and that on that occasion petitioner picked up the money (Tr. 258). In addition, during this period, Benito Montemayor indicated to Bowman that the money belonged to petitioner (Tr. 128).

the government. *Glasser v. United States*, 315 U.S. 60, 80 (1942). The court of appeals summarized in detail the evidence that supported petitioner's conviction on each count and correctly concluded that it was sufficient to support the convictions (Pet. App. 4a-8a). That fact-bound conclusion does not warrant further review.

Petitioner's primary contention appears to be that Bowman's testimony that he saw the conspirators packaging cocaine and manufacturing heroin in Mexico in preparation for smuggling into the United States was "conclusionary" (Pet. 26) and that no laboratory test corroborated Bowman's statements that the substances he saw were illegal drugs. Although the substances Bowman referred to were not subjected to expert analysis, the jury was entitled to conclude that petitioner was trafficking in heroin and cocaine. Bowman's testimony indicated that he was familiar with the mode of operation of petitioner and his brothers and with the drugs that were sold. The government was not required to confirm Bowman's testimony through laboratory analysis. See *United States v. Quesada*, 512 F.2d 1043, 1045 (5th Cir.), cert. denied, 423 U.S. 946 (1975).

Petitioner also suggests (Pet. 27) incorrectly that he was convicted of being the manager of the drug conspiracy solely on the basis of Bowman's "general statement" that petitioner was "in charge." In fact, the government adduced specific evidence that petitioner directed loading of a vehicle used to carry cocaine (Tr. 148-150), that petitioner supervised the counting of the money the conspirators obtained during their trips to the United States (Tr. 147), that petitioner presided over the meetings the Montemayor brothers held to discuss their drug business and to contact prospective purchasers (Tr. 172-174), and that petitioner operated a heroin laboratory on his property in Mexico (Tr. 161-162). From this evidence, the jury could properly conclude that petitioner was the manager of the illegal drug operations.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

MARGARET I. MILLER
Attorney

FEBRUARY 1984